

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses and	)	
Section 214 Authorizations from	)	
	)	MB Docket No. 02-70
	)	
AT&T Broadband L.L.C.	)	
Transferor	)	
	)	
to	)	
	)	
Comcast Communications Inc.	)	
Transferee	)	
To: Chief, Media Bureau		

**PETITION TO DENY**

Minority Television Project Inc., licensee of KMTP(TV), Channel 32, San Francisco, California, a non-commercial public television station (“KMTP”), by its attorneys, hereby requests the Commission to deny the above-captioned applications. As detailed below, KMTP submits that a grant of the assignment applications would not serve the public interest.

**I. BACKGROUND STATEMENT**

**A. KMTP**

KMTP is one of two African-American controlled public televisions stations in the country. KMTP’s mission is multiculturalism, providing programming by and about African Americans, Asian Americans, Native Americans and other underrepresented groups. These groups make the San

San Francisco television market one of the most diverse in the country. KMTP's program schedule includes the market's only nightly locally-produced news in Korean, Vietnamese and Tagalog. KMTP also broadcasts the country's only nightly news show with a Pan-African focus.

In May 1993, a special task force, chaired by the President of Brown University and composed of eleven distinguished media professionals, including former FCC Commissioner Ervin Duggan, conducted a seminal study and issued a report on the status of public broadcasting entitled *Quality Time? The Report of the Twentieth Century Fund Task Force on Public Television* (distributed by Brookings Institution, 188 pages, 1993). This was the first major report examining the status of public television since the landmark Carnegie Report. The 1993 report, while criticizing many stations, which are the second and third public stations in their markets, for substantial duplication of programming, lauded three stations, including KMTP, for their distinctive program formats.<sup>1</sup>

### **B. AT&T Broadband**

AT&T Broadband L.L.C. ("AT&T") operates the vast majority of cable television systems within the San Francisco television market. According to Nielsen Media Research, AT&T controls at least 1,399,318 of the 1,586,737 or 88% of cable households in the San Francisco market.<sup>2</sup> Additionally, AT&T currently is the nation's largest cable operator.

### **C. Carriage Complaint**

On February 3, 2000, KMTP filed a Complaint for Carriage against AT&T,<sup>3</sup> demonstrating that AT&T (and its predecessors), since 1993, made concerted efforts to deny carriage of the signal of KMTP from AT&T's systems in violation of the Commission's Rules.<sup>4</sup> Additionally, in a petition

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<sup>1</sup>See, Chapter 6, "Weights and Measures," online at [www.txf.org/Task-Forces](http://www.txf.org/Task-Forces).

<sup>2</sup>Cable On-Line Data Exchange, January 22, 2000. The numbers exclude recent acquisitions (e.g., Santa Rosa, Palo Alto), which push the total to more than 90%.

<sup>3</sup>Complaint for Carriage File No. CSR-5524-M (pending).

<sup>4</sup>A copy of the Complaint is attached hereto.

requesting sanctions against AT&T, KMTP demonstrated that, in deleting carriage, failing to restore carriage and denying on-channel carriage, AT&T engaged in an on-going, sustained pattern of rule violations.<sup>5</sup> The response of AT&T is that, because (a) the rule violations are dated, and (b) AT&T believes that KMTP has broadcast sponsorship announcements in violation of the Commission's Rules, AT&T declines to provide carriage and should be excused from its violations.<sup>6</sup>

## **II. THE ASSIGNMENT APPLICATIONS**

Under the Telecommunications Act of 1996,<sup>7</sup> mergers, such as the one proposed herein, are subject to dual review by the Department of Justice and the Commission. This dual merger review is intended to further the Act's goal of opening all telecommunications markets to competition. The Commission independently reviews mergers to determine if the transfer of licenses would be in the public interest. In analyzing a merger, the Commission examines how the proposed transaction will affect all communications markets and balances the procompetitive effects with its anticompetitive effects. The Commission's cable television rules are designed, in part, to promote competition. And, the mandatory carriage rules are designed specifically to assure that local broadcast station voices, which are in competition with AT&T-owned cable program voices, are available to AT&T cable subscribers.<sup>8</sup>

## **III. ARGUMENT**

KMTP maintains that its complaint and AT&T's response, demonstrate that AT&T has a long-standing practice of willful non-compliance and willful manipulation of the carriage rules.

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<sup>5</sup>Petition To Initiate A Forfeiture Proceeding (CSR-5513-M), filed on February 15, 2002, is also attached.

<sup>6</sup> See, Opposition to Complaint for Carriage, filed by AT&T on June 14, 2000.

<sup>7</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>8</sup>See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438-43 (D.C. Cir. 1985).

KMTP notes that in its long standing practice of denial of carriage and denial of on-channel carriage to KMTP, AT&T has favored program services in which AT&T holds equity interests. AT&T should not be rewarded with the benefits of this merger for this pattern of flagrant disregard of the carriage rules. Importantly, this past practice of indifference to, and non-compliance with, the mandatory carriage rules, suggests strongly that the proposed merged entity will not comply with the mandatory carriage rules either.

Viewpoint diversity is one of the ultimate goals of competition.<sup>9</sup> AT&T has acted to defeat this goal. As demonstrated in the Complaint for Carriage, AT&T elected to carry KMTP in urban areas, such as San Francisco, Oakland and San Jose, but not in suburban areas, such as Napa, Portola Valley or Walnut Creek. Because the minority racial composition of the first group of cities is substantial, and the minority composition of the latter group of cities is insubstantial, AT&T's carriage practices raise a question of whether this is a case of intentional or unintentional discrimination, either of which would be inconsistent with the public interest.

KMTP notes that AT&T also has used its monopoly power in the San Francisco television market to disadvantage a competing cable system. Seren Innovations Inc. is a new entrant offering an array of telecommunications services, including cable television. In testimony before the Commission on February 4, 2000<sup>10</sup> – one day after KMTP filed its Complaint – Seren detailed for the Commission a pattern of abuses by AT&T, including collusion with AT&T local partners to deny Seren access to the program service, Bay TV, a joint venture of AT&T and the former licensee of KRON-TV, Channel 4, San Francisco. Seren noted that the crux of the problem was the

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<sup>9</sup>See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1995); see also Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979, 982 (1978); see also Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?, Christine Bachen, et al., December, 1999 at 37.

<sup>10</sup>Testimony of Peter M. Glass, Vice President, Seren Innovations Inc., Cable Services Bureau Forum On AT&T-Media One Merger Application, February 4, 2000.

enormous market power of AT&T. An enlargement of that market power by granting the captioned applications will only increase the merged entity's potential for exclusionary behavior and give it more market power as it continues its practice of non-compliance with the mandatory carriage rules.

#### **IV. CONCLUSION**

KMTP maintains that given AT&T's extended record of anticompetitive behavior, the grant of the merger applications would not serve the public interest. Thus, KMTP petitions the Commission to deny the captioned applications.

Respectfully Submitted,

**MINORITY TELEVISION PROJECT INC.**

By its Attorneys,

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James L. Winston  
Paul M. Breakman  
RUBIN, WINSTON, DIERCKS,  
HARRIS & COOKE, L.L.P.  
1155 Connecticut Avenue, N.W.  
Sixth Floor  
Washington, D.C. 20036  
(202) 861-0870

April 29, 2002

## **Declaration**

I, Booker T. Wade, Jr., declare as follows:

I am the General Manager of KMTP-TV, Channel 32, San Francisco, California.

I have personal knowledge of the facts and events detailed in the Petition To Deny and have read the Petition to Deny.

I declare under penalty of perjury that the information contained therein is true to the best of my knowledge and belief.

April 29, 2002  
San Francisco, California

**Booker T. Wade, Jr.**

Booker T. Wade, Jr.

**Complaint for Carriage File No. CSR-5524-M (without attachments)**

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In re )  
 )  
Minority Television Project, Inc. )  
License of Non-Commercial Television )  
Station KMTP, Channel \*32 )  
For Carriage of KMTP(TV) )  
San Francisco, California )

**COMPLAINT FOR CARRIAGE**

To: Chief, Cable Bureau

**I. INTRODUCTION**

Minority Television Project, Inc. ("MTP"), licensee of non-commercial television station KMTP(TV), Channel 32, San Francisco, California ("KMTP"), by its attorneys, hereby files this complaint, pursuant to Sections 76.7 and 76.61(b) of the Commissions's Rules, against AT&T Broadcast and Internet Services, operator of cable television systems serving the San Francisco television market ("AT&T"). KMTP submits that AT&T has: (1) violated Sections 76.56 of the Commission's rules in denying KMTP carriage of its signal on several systems, (2) violated Section 76.57 by denying on-channel carriage on several systems and, (3) violated Section 76.58 by not notifying KMTP before deleting it from carriage on other systems.

Pursuant to Section 615 of the Communications Act<sup>8</sup> and implementing rules adopted by the Commission in its *Implementation of the Cable Television Consumer Protection and Competition*

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<sup>8</sup>47 U.S.C. Sec. 535.



*Act of 1992, Report and Order ("Must Carry Order")*,<sup>9</sup> noncommercial television broadcast stations ("NCE") are entitled to assert mandatory carriage rights on cable systems.<sup>10</sup> AT&T has failed to comply with its signal carriage obligations required by the Commission's rules and the Communications Act. Accordingly, KMTP seeks on-channel carriage of its broadcast signal on all AT&T systems currently not carrying the signal of KMTP, and on-channel carriage on those systems currently carrying the signal of KMTP on a channel other than Channel 32.

## **II. BACKGROUND**

### **A. KMTP**

In August 1991, MTP acquired KMTP [then known as KQEC, Channel \*32] from KQED Inc., pursuant to a Commission decision. *KQED Inc.*, 5 FCC Rcd 1784 (1990). With the acquisition, KMTP became the second African-American controlled, and the only African American "community-controlled" public television station in the country.

The mission of KMTP is multiculturalism, providing programming by and about African Americans, Asian Americans, Native Americans and Hispanic Americans. These groups make San Francisco one of the most diverse television markets in the country. KMTP's program schedule includes the market's only nightly locally-produced news in Vietnamese, Tagalog and Korean. KMTP's programming serves minority audiences while also enriching majority audiences.

In addition to its distinctive multicultural format, and because transportation and traffic congestion are major community problems, each weekday morning, KMTP broadcasts from 5:00 a.m. to 9:00 a.m., "Traffic Check," continuous transportation and traffic incident reports affecting

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<sup>9</sup>8 FCC Rcd 2965, 2966-2971 (1993).

<sup>10</sup>47 C.F.R. Sec. 76.56.

the eleven-counties in, and adjacent to, the San Francisco Bay Area.<sup>11</sup> The information is provided to KMTP 24-hours daily by Etak Inc., a unit of Sony Corporation, which secures the data from Metro Networks Inc., the California Highway Patrol, Bay Area Rapid Transit District (BART), Cal-Train and other transit agencies.

In May 1993, a special task force, chaired by the President of Brown University and composed of eleven distinguished media and national professionals, including former FCC Commissioner Ervin Duggan, conducted a seminal study and issued a report on the status of public broadcasting entitled *Quality Time? The Report of the Twentieth Century Fund Task Force on Public Television*. This was the first major report examining the status of public television since the landmark Carnegie Report. The 1993 report, while criticizing many second and third public stations within a market for substantial duplication of programming, lauded three stations, including KMTP, for their “distinctive” program formats.<sup>12</sup>

## **B. AT&T**

In 1999, AT&T acquired its cable systems in the San Francisco market from TCI of California Inc. Prior thereto, TCI acquired the systems from several operators, but mostly from Viacom Cable.<sup>13</sup> In 1991, when MTP acquired Channel 32, Channel 32 was carried on 65 of the 80 San Francisco market cable systems.<sup>14</sup> At some time subsequent to MTP's acquisition of Channel 32, as detailed below, AT&T and its predecessor operators embarked on what appears to be a concerted effort to strip KMTP of its carriage rights.

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<sup>11</sup>The counties are San Francisco, San Mateo, Santa Clara, Santa Cruz, Alameda, Contra Costa, Solano, Napa, Sonoma Marin and Stanislaus.

<sup>12</sup>*Ibid*, Chapter 6, "Weights and Measures," online at [www.tcf.org/Task-Forces](http://www.tcf.org/Task-Forces)

<sup>13</sup>Other AT&T predecessor-operators are shown at Attachment F, pp. 3-7.

<sup>14</sup>See, Brief, Broadcast Station Rebuttal, filed with the Supreme Court on June 16, 1995, of Time Warner Entertainment Company, L.P., Exhibit 166A, pp. 5006500-13, *Turner Broadcasting Systems Inc. v FCC*, 520 U.S. 180, 117 S.Ct. 1174 (1997), Excerpt attached as Attachment A.

Incrementally, over the years, AT&T and its predecessors, have dropped the carriage of KMTP in violation of the Commission's Rules. While most of the prohibited drops were occasioned by AT&T predecessors, the drops have continued since the acquisition of systems by AT&T<sup>15</sup> Despite informal and formal requests, AT&T has refused to restore carriage and to provide KMTP with entitled carriage.

### **III. ARGUMENT**

#### **A. AT&T HAS NOT FULFILLED ITS SIGNAL CARRIAGE OBLIGATIONS UNDER § 76.56 OF THE COMMISSION'S RULES**

In awarding it a license, the Commission concluded that MTP is a non-profit entity under state law. *KQED Inc. supra*. KMTP(TV) is licensed to MTP by the Commission [File No. BPET 831101KI], as a full-power noncommercial educational station, licensed to the City of San Francisco.<sup>16</sup>

AT&T operates cable television systems within the San Francisco television market and within 50 miles of San Francisco. A list of these systems, owned by AT&T, together with the communities served, is shown on Attachments B and C.

The AT&T systems known to be carrying KMTP, and the various channel positions, are shown on Attachment B. The AT&T systems which are not carrying KMTP are shown on Attachment C.

On or about October 1, 1999, KMTP wrote via certified mail, return receipts requested, to each of the AT&T systems known to be not carrying KMTP, and to AT&T corporate officers, requesting carriage pursuant to the must-carry rules.<sup>17</sup> However, as of this writing AT&T has failed

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<sup>15</sup>See *infra*, Section B.

<sup>16</sup>KMTP is eligible to and has received federal grants pursuant to 47 U.S.C. 396(k)(6)(B).

<sup>17</sup>See Attachment D (copies of the letter request to AT&T corporate and a representative letter to individual systems, together with U.S. Postal Service documentation of proof of delivery)

to provide carriage or written assertions as to why KMTP is not entitled to carriage.

Section 76.56(a)(5) of the Rules provide that notwithstanding other contrary provisions of the must-carry rules, if a cable system carried a local non-commercial educational station's broadcast signal on March 29, 1990, that system was required to continue to carry the station's signal.

To the best knowledge of the management of KMTP (See attached Declaration of William Hammons), on March 29, 1990, Channel 32 was carried on all of the AT&T systems in accordance with the FCC rules. However, in a challenge to the FCC must-carry rules before the Supreme Court in 1995, the cable industry argued that public stations in markets with multiple public stations were simply duplicating the PBS program service of the dominant public station.<sup>18</sup> The cable operators cited a 1988 survey conducted by the National Association of Broadcasters which showed, *inter alia*, that Channel \*32 was carried on 65 of the 80 local cable systems.<sup>19</sup> Currently, KMTP is carried on only 15 systems: eleven AT&T systems and four others. Since 1990, there have been numerous ownership changes and technical re-configurations/consolidations to the AT&T systems, which make it nearly impossible to trace exact progressions in the carriage deletions suffered by KMTP.

Pursuant to 76.56(e), on August 25, 1999 KMTP wrote to each AT&T cable system known not to be carrying KMTP, and to AT&T corporate officers, respectively requesting that AT&T provide KMTP with a list of the broadcast channels carried on each of its systems as of March 29, 1990.<sup>20</sup> The FCC rules require that AT&T provide the channel information within thirty days. *See*

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<sup>18</sup>See Note 2.

<sup>19</sup>KMTP believes that there are ten non-AT&T cable systems in the market. Six are known not to be carrying KMTP. These include Sun Coastside Cable, Half Moon Bay, Wander Cable, Gualala; Gorizon Cable, Fairfax; Falcon Cable, Gilroy; Cable One, Santa Rosa; and Mediacom, Clearlake Oaks. KMTP intends to file complaints against these systems also.

<sup>20</sup>See Attachment E.

§ 76.56(e). To date, AT&T has not responded. It simply has ignored the requests.

Finally, § 76.56(a)(1)(iii) of the Commission rules requires that all cable systems with more than 36 channels, must carry a minimum of three NCE channels, but it does not preclude requiring such a system to carry additional NCE channels. Indeed, the *Report and Order* in MM Docket No. 92-259, 8 FCC Rcd 2965 (1993) specifically states: “[s]ystems with a capacity of more than 36 usable activated channels are generally required to carry the signals of all qualified local NCE stations requesting carriage.” The only exception to this requirement is when there is substantial programming duplication between local NCE stations, a circumstance not present in this matter.

Given the foregoing, KMTP urges the Commission to order AT&T to carry KMTP on all AT&T systems not currently carrying KMTP.<sup>21</sup>

**B. AT&T HAS NOT PROVIDED KMTP PROPER NOTIFICATION UNDER § 76.58 OF THE COMMISSION’S RULES**

Section 76.58 of the Rules precludes a cable system from deleting carriage of a station's signal unless the cable operator first provides at least thirty days written notice to the station and to the subscribers of the cable system. *See* § 76.58(a).

In a September 1, 1992 Station Cable Report,<sup>22</sup> the Arbitron Company showed that in 1991 and/or 1992, AT&T cable systems carried KMTP on the following systems:

System/Community	Channel Position
Hercules	39
Newark	32
San Rafael-Marin County	32
Napa, American Canyon	32
Dublin, Livermore, Pleasanton, San Ramon	34 & 19
Daly City	13

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<sup>21</sup>See also, Section B, *infra*.

<sup>22</sup>See Attachment F.

Redwood City	34
Mt. View	13
Newark	34/32
Cupertino	33
San Leandro	34A
Castro Valley	19B

Additionally, according to published reports in the March 25, 1990 and April 1, 1990, Sunday editions<sup>23</sup> of the *San Jose Mercury* newspapers, KMTP was also carried by AT&T systems in the following communities:<sup>24</sup>

Los Gatos	31R
Saratoga	32

However, without notice to KMTP,<sup>25</sup> and in violation of the rules, AT&T simply ceased carrying the signal of KMTP on these systems.<sup>26</sup>

**C. AT&T HAS FAILED TO PROVIDE KMTP PROPER CHANNEL POSITIONING UNDER § 76.57 OF THE COMMISSION'S RULES**

On November 1, 1999, AT&T wrote KMTP advising that it intended to re-position KMTP on its system serving the City of San Francisco from Channel \*32 to Channel 24.<sup>27</sup> On November

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<sup>23</sup>While the newspaper did not publish a cable line up for March 29, 1990, KMTP believes that the demonstrated carriage five days before, and two days after March 29, 1990, is persuasive proof of carriage on March 29, 1990. Moreover, pursuant to § 76.58(e) of the Commission's rules, by June 2, 1993, AT&T was required to send KMTP a list of all stations carried on its system, including channel position, but failed to do so. See § 76.58(e).

<sup>24</sup>See Attachment I.

<sup>25</sup>There is one exception. In 1993 Viacom Cable wrote KMTP that it was ceasing carriage of KMTP in Marin County because of "low viewership." See Attachment F-1. In 1993, KMTP requested the Marin system to restore carriage. See Attachment F-2. The system ignored the request.

<sup>26</sup>The traditional cable industry challenges to carriage of noncommercial stations has been based on claims of substantial duplication and channel capacity limitations. Herein, there are no such allegations, and, indeed, there is no such duplication. In addition, an examination of the current channel line ups of the AT&T systems shows that all have in excess of 78 activated analog channels, which demonstrates that KMTP is required to be carried. See [www.tci.com/cgi-bin/chanframe.cgi](http://www.tci.com/cgi-bin/chanframe.cgi).

<sup>27</sup>See Attachment H-1.

11, 1999, KMTP wrote AT&T advising AT&T that: (1) KMTP objected to the re-positioning in San Francisco; and that (2) given AT&T's announced initiative to generally re-align channel positions on all of its systems throughout the market, KMTP requested that AT&T carry KMTP on-channel on all of its systems, absent carriage on a channel lower than 15.<sup>28</sup> Despite the default request for on-channel carriage, on December 1, 1999, AT&T, over the objections of KMTP, re-positioned KMTP to Channel 24 and failed to provide on-channel carriage on its other systems. Such action and inaction by AT&T is a direct violation of the FCC rules, which require that “[a]t the election of the licensee of a qualified local [non-commercial educational] television station carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel on which such station is broadcast over the air ...” See § 76.57(b).

#### **IV. CONCLUSION**

KMTP believes that AT&T has ceased and currently denies carriage of KMTP on some of its systems for reasons that fundamentally contravene the Commission's policies of fostering diversity. KMTP does not believe that it is coincidental that AT&T carries its signal on its systems in diverse communities<sup>29</sup> - e.g., San Francisco, Oakland, San Jose - while denying and deleting carriage in less or non-diverse communities - e.g., Marin County, San Mateo, Napa, Sonoma, Saratoga, Los Gatos, Mountain View, Petaluma, Woodside, Brentwood, San Ramon.

It appears that AT&T has concluded that KMTP's multicultural format is not modeled for wide distribution. KMTP has demonstrated by the Report of the Twentieth Century Fund Task

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<sup>28</sup>See Attachment H-2.

<sup>29</sup>However, a diverse community is not always a given. In May 1999, AT&T acquired a SMTV cable system, Crown Colony Village, serving a 1025-unit garden apartment complex in Daly City, California. That community is 32% Filipino. KMTP is the only station in the market to broadcast a nightly locally produced evening news in Tagalog. Prior to AT&T acquisition, the system carried KMTP on Channel 57. Following the acquisition, AT&T deleted carriage of KMTP. See Attachment G.

Force (as discussed above) that the station's distinctive format enriches all audiences.

Commission policies and precedents require cable operators and broadcasters to attempt a good faith implementation of the must-carry rules. KMTP maintains that: (1) despite informal and formal requests for carriage, AT&T simply ignores the requests for carriage; (2) despite the prohibitions against the cessation of carriage, AT&T has improperly deleted KMTP from carriage; and (3) despite formal requests for on-channel positioning and timely objections to repositioning, AT&T simply ignores these requests. AT&T's policy is simply to ignore or violate its obligations under Commission Rules. As such, Commission action against AT&T is required.

Having demonstrated that KMTP is a qualified noncommercial station; that KMTP was carried on AT&T systems on March 29, 1990; and that AT&T has illegally ceased carriage of KMTP as required by the Commission's rules, KMTP requests that the Commission direct AT&T to immediately commence on-channel carriage of the signal of KMTP on all of its cable systems within the San Francisco television area.

Respectfully submitted,

MINORITY TELEVISION PROJECT, INC.

By its Attorneys,

Rubin, Winston, Diercks, Harris & Cooke, L.L.P.

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James L. Winston  
Paul M. Breakman  
1155 Connecticut Avenue, N.W., Sixth Floor  
Washington, D.C. 20036  
Telephone (202) 861-0870  
Facsimile (202) 429-0657





**Petition To Initiate A Forfeiture Proceeding (CSR-5513-M)**  
**(without attachments)**

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In reply to:	)	
	)	
	)	
Minority Television Project Inc.	)	
KMTP(TV), Channel 32	)	
	)	CSR-5513-M
	)	
For Carriage of KMTP(TV)	)	
San Francisco, CA	)	
	)	

To: Chief, Cable Services Bureau

**PETITION TO INITIATE A FORFEITURE PROCEEDING**

**I. INTRODUCTORY STATEMENT**

Minority Television Project Inc., licensee of noncommercial television station KMTP, Channel 32, San Francisco, California, ("KMTP"), pursuant to Section 615 of the Communications Act, of 1934, 47 USC 535, and Sections 1.80, 76.7 and 76.56 of the Commissions Rules, by its attorneys, hereby requests that the Commission initiate a forfeiture proceeding against AT&T Broadband, and Internet Services Inc. ("AT&T") for repeated and continuing violations of the Commission's cable must carry rules. In support of its Petition, KMTP submits the following:

On February 3, 2000, KMTP filed a Complaint for Carriage ("Complaint") against AT&T, operator of cable television systems within the San Francisco television market. On June 14, 2000, AT&T filed an Opposition To Complaint for Carriage ("Opposition"). Thereafter, on June 26, 2000, KMTP filed a Reply to Opposition to Complaint for Carriage ("Reply"), on July 21, 2000, KMTP filed a Supplement to Reply To Opposition for Complaint for Carriage ("Supplement") and on August 2, 2000, AT&T filed a Response to Supplement to Reply to Opposition to Complaint for Carriage ("Response").

On April 24, 2001, the staff of the Cable Services Bureau held a settlement conference at the Commission's offices. Subsequent discussions between KMTP and AT&T resulted in the initiation of carriage by AT&T in some communities, but carriage is still being denied in many communities.

This Petition is necessitated by AT&T's continued denial of carriage, and, as shall be set forth below, AT&T's long term pattern of intentional denial of carriage to KMTP over a period

of years. Thus, AT&T's previous refusal to carry KMTP, coupled with its ongoing refusal to carry KMTP, warrants the initiation of a forfeiture proceeding at this time.<sup>30</sup>

## **II. MONOPOLY POWER ABUSES**

KMTP submits that the Complaint, the Opposition, the Reply, the Supplement and the Response, all support KMTP's position that AT&T and its predecessor operators, over the years, have knowingly made a concerted effort to strip KMTP of its cable carriage rights by a pattern of deletions, rule violations, evasions and manipulations. The pattern of abuse continues to this date.

While any pattern of violations, evasions and manipulations is inconsistent with the obligations of any registered cable operator, the demonstrated pattern is especially inconsistent with the obligations of AT&T, since AT&T is the nation's largest cable operator and controls 90% of all cable households in the San Francisco market. This monopoly position imposes upon AT&T a special responsibility. See, e.g. National Cable Television Association v. FCC, 286 U.S. App. D.C. 229, 914 F.2d 28S (D.C. Cir. 1990). KMTP maintains that this includes the obligation not to use its position of dominance to disadvantage other competing market voices, especially a small emerging minority-controlled public television station, one of only two in the country.

AT&T has specific incentives and motives for its abuses. In addition to being the dominant cable operator in the market, AT&T economically benefits from the non-carriage of KMTP. In lieu of carrying KMTP on the channels where it had carriage prior to the illegal deletions since 1992<sup>31</sup> or on its station's off-air channel, AT&T carried the following national program services: CNN2, Discovery Channel, QVC and HBO.<sup>32</sup> These program services are owned in whole or part by AT&T, including one or more of its affiliates, i.e., Time Warner Inc. or Liberty Media Group Inc. Thus, AT&T not only profits from the general and expected flow of dollars as would any business, but it profited, and continues to do so, further from its ownership interests by denying KMTP its statutory rights. This is classical monopolistic abuse.

In Cablevision Systems Corporation, 15 FCC Rcd 24298 (2000), the Commission ruled on a situation very similar to the facts of this case. The Commission assessed a forfeiture of one hundred twenty-seven thousand five hundred dollars (\$127,500) for Cablevision's repeated failure to provide on channel carriage to WXTV. The Commission noted that WXTV had attempted to negotiate a settlement with Cablevision, but Cablevision refused to settle. In assessing the forfeiture, the Commission held:

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<sup>30</sup>Attached hereto as Attachment A is a copy of a letter being filed today with the Cable Services Bureau, identifying the communities where AT&T continues to deny carriage to KMTP.

<sup>31</sup>This includes Channels 34, 4, 19 and 33 in Newark, Napa, Livermore-Pleasanton, Daly City, Castro Valley, San Leandro and Cupertino. See Complaint, Attachment E.

<sup>32</sup>As of June 1, 2001, AT&T's channel line ups were available at [www.cable.att.com](http://www.cable.att.com). The zip codes entered for the respective cities were secured online from the U.S. Postal Service at [www.framed.usps.com](http://www.framed.usps.com).

We continue to believe that the existence of negotiations is irrelevant to whether Cablevision met its statutory and regulatory obligations to commence carriage of the station on Channel 41.

Cablevision, supra at par. 12.

The facts before the Commission are even more egregious than those presented in the Cablevision case. Unlike Cablevision, which was carrying WXTV, but not doing so on the proper channel, AT&T is still not carrying KMTP in communities where KMTP is entitled to carriage. Thus, a Commission sanction against AT&T in this case is very appropriate.

### **III. REQUEST FOR FORFEITURE PROCEEDING**

As demonstrated in the pleadings and as shown below, AT&T has used its monopoly position to disadvantage KMTP and in the process, knowingly has committed numerous violations of the Rules and the statute. Specifically, KMTP believes that AT&T has committed at least 133 violations of the Commission's Rules. Thus, pursuant to Section 76.9(a)(2) of the Rules, KMTP petitions the Commission to initiate a forfeiture proceeding against AT&T for violating the Commission's Rules.

### **IV. STATUTORY AND RULE VIOLATIONS**

#### **A. Violations 1 - 102**

Pursuant to Section 76.56(e), on August 25, 1999, KMTP wrote to each of the 34 then-known AT&T cable systems<sup>33</sup> requesting that AT&T disclose the identification of broadcast signals carried on the respective systems. To date, AT&T has not responded to the requests. The failure to respond constituted 34 violations of the Rules, one for each cable system served. And, on November 8, 1999, KMTP again wrote AT&T requesting AT&T to provide the requested information.<sup>34</sup> AT&T again failed to provide the requested information. The second failure to respond constituted an additional 34 violations. AT&T suggests that it should be excused from the violations because at the time the requests were made the parties were in "...significant informal..." negotiations.<sup>35</sup> That assertion is untrue and is unsupported by an affidavit. Further, it is inconsistent with the November 8, 1999 letter to John Kopchick.<sup>36</sup> Additionally, as AT&T concedes, the filing of the Complaint, re-instated the demand for the disclosures. And, as quoted above, the Commission has concluded that on-going carriage negotiations do not justify denial of carriage. See Cablevision, supra. Thus, the failure to provide the data upon filing of the Complaint constituted 34 additional violations.

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<sup>33</sup> See Complaint, Attachments D and E.

<sup>34</sup> See, Letter of November 8, 1999 to John Kopchick, Attachment B.

<sup>35</sup> See Opposition, Note 6.

<sup>36</sup> See Note 5, above.

## **B. Violations 103 - 114**

On November 1, 1999, AT&T wrote KMTP advising that it intended to re-position KMTP on its system serving the City of San Francisco from Channel 32 to Channel 24.<sup>37</sup> On November 15, 1999, KMTP replied, advising AT&T that KMTP objected to the re-positioning and elected to be placed on Channel 32 in San Francisco *and on all systems* then-carrying KMTP.<sup>38</sup> KMTP followed up with a second letter to John Kopchick on December 7, 1999.<sup>39</sup> AT&T proceeded to re-position KMTP on Channel 24 in San Francisco and additionally failed to re-position KMTP on Channel 32 on the other ten systems. AT&T simply ignored the election, defied the Rules and the statute. AT&T obviously believes that there are no consequences to its defiance. The repositioning to Channel 24 in San Francisco and the failure to reposition to Channel 32 on the other headends constituted eleven violations of Section 76.57(b).

## **C. Violations 115 - 116**

In 1999, AT&T acquired a cable television system serving Crown Colony Village in Daly City. At the time of the acquisition, the system carried the signal of KMTP on Channel 57. Following the acquisition, AT&T deleted carriage of KMTP without prior notice to KMTP or its subscribers.<sup>40</sup> This deletion was in violation of Section 76.58(a) of the Rules. AT&T has no response to the re-positioning.<sup>41</sup> The continuation of the deletion following the filing of the Complaint constitutes an additional violation.

## **D. Violations 117 - 119**

Section 76.56(a)(1)(iii) requires AT&T to carry KMTP on all of the AT&T systems serving the San Francisco market, subject to certain statutorily specified conditions. Thus, on October 1, 1999, KMTP formally requested AT&T to carry its signal on all of its cable systems not then carrying the signal. AT&T ignored the request. Until the settlement conference held by the Commission staff on April 24, 2001, a year and a half later, AT&T did not add KMTP to any of its systems. However, AT&T has conceded that at least two systems, Fremont and Hayward, met all of the conditions requiring carriage during that year and half.<sup>42</sup> However, rather than provide carriage, AT&T unilaterally decided to ignore its obligations to carry KMTP on these systems, because AT&T believed KMTP is violating the noncommercial rules. Section 1.80 of the Commission's Rules grants the Commission, not AT&T, the discretion and the authority to impose sanctions on licensees who may violate the Commission's Rules or the Communications Act. Additionally, Section 76.7(a)(1) of the Commission's Rules specifically reserve for the Commission – not AT&T – the authority to suspend, modify or waive the provisions of the must carry rules. AT&T arrogated to itself the Commission's responsibility to interpret and enforce

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<sup>37</sup> See Complaint, Attachment H-1.

<sup>38</sup> See Complaint, Attachment H-2.

<sup>39</sup> See letter to John Kopchick dated December 7, 1999, Attachment C.

<sup>40</sup> See Complaint, Attachment G.

<sup>41</sup> See Response, page 5, where AT&T distinguishes its apparent response in the Opposition.

<sup>42</sup> Opposition, Note 4.

its rules and decided to ignore the must carry rules. AT&T's actions constitute at least two additional violations.

#### **E. Violations 120 - 133**

In the Complaint,<sup>43</sup> KMTP demonstrated that over the years, AT&T and its predecessors deleted carriage of KMTP without proper notification on fourteen (14) of the systems in violation of Section 76.57 of the Rules. KMTP has shown that AT&T's claim, that neither it nor its immediate predecessors is responsible, is unconvincing.<sup>44</sup> However, accepting *arguendo* that claim, AT&T's failure to correct the violations, following notice,<sup>45</sup> i.e., continuing to accept the benefits of the illegal deletions following notice of the violations, constitutes a ratification of the prior illegal deletions and thereby constitutes 14 independent violations.

#### **F. Lack of Good Faith**

##### **1. Pattern of Violations**

The pattern of violations by AT&T is blatant. AT&T simply decided that it will solely decide where and when its systems will carry KMTP and on which channels -- KMTP objections, elections and requests, the Communications Act and Commission Rules notwithstanding. AT&T simply is attempting to suffocate KMTP by denying KMTP carriage and the concomitant revenue flows inherent to carriage. AT&T has used its monopoly power to ignore KMTP with impunity. This dates back to the failure of AT&T to respond to KMTP's request for information, as shown above.

On November 8, 1999, KMTP wrote John Kopchick, Division President of AT&T for California and alerted him that his operating staff was not responding to requests for information or carriage. KMTP noted to Mr. Kopchick that the Commission required good faith compliance with the Rules. Copies of the letter were provided to AT&T corporate legal and programming officers. Yet, AT&T, including its operating officers and its legal officers, still failed to provide the requested information.

Even in the face of a Commission complaint, AT&T still ignores its obligations to KMTP. The pleadings -- both KMTP's<sup>46</sup> and AT&T's<sup>47</sup> -- are replete with evidence of a lack of good faith by AT&T in meeting its carriage obligations. Thus, KMTP urges the Commission to initiate a forfeiture proceeding against AT&T.

##### **2. Manipulations and Evasions**

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<sup>43</sup> Section III. B., page 7.

<sup>44</sup> Supplement to Reply, at 11.

<sup>45</sup> See Letter of November 8, 1999, to John Kopchick, Attachment B.

<sup>46</sup> See generally, Reply.

<sup>47</sup> See, e.g., Opposition, Note 4, Note 6. See also Section I. and II., above.

In the Supplement, KMTP demonstrated that AT&T has manipulated the designation of its headends in an effort to evade its obligations under the must carry rules. Specifically, the Declarations submitted reflect that at Walnut Creek, AT&T knowingly attempted to mislead KMTP and the Commission as to its true headend. The statements of the AT&T technicians that they had previously taken successful measurements at the site and reported the same to their managers, and the subsequent communications by an AT&T manager that the site was not the headend, is evidence that AT&T was trying to evade its must carry obligations. AT&T's only response is that KMTP has not been prejudiced by the manipulations.<sup>48</sup> AT&T is oblivious to its obligations of acting in good faith.<sup>49</sup>

### **G. Forfeiture Amount**

The Note to Section 1.80(b)(4) of the Commission's Rules provides a base forfeiture of \$7,500 for a violation of the cable broadcast carriage rule. Section 1.80(b)(1) of the Commission's Rules provides that the Commission may issue a notice of apparent liability for forfeiture of up to \$27,500, for each violation or each day of a continuing violation, subject to a maximum of \$300,000 per continuing violation. Given that there are at least 133 violations in 14 different communities, the appropriate amount of forfeiture should be calculated as  $14 \times \$300,000 = \$4,200,000$ . KMTP requests that the Commission review the facts presented and initiate a forfeiture proceeding as set forth herein.

Respectfully submitted,

MINORITY TELEVISION PROJECT, INC.

By its Attorneys,

Rubin, Winston, Diercks, Harris & Cooke, L.L.P.

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James L. Winston  
Paul M. Breakman  
1155 Connecticut Avenue, N.W.  
Sixth Floor  
Washington, D.C. 20036  
Phone: (202) 861-0870  
Fax: (202) 429-0657

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<sup>48</sup>Response, page 4.

<sup>49</sup>AT&T also ignores the loss of revenues occasioned by the delay in providing carriage and costs incurred by KMTP in prosecuting the Complaint.



